

**INQUIRY CONCERNING JUDGE,
NO. 96****IN RE:****THE HONORABLE SHARON KELLER,
PRESIDING JUDGE OF THE TEXAS
COURT OF CRIMINAL APPEALS,
AUSTIN, TRAVIS COUNTY, TEXAS**§
§
§
§
§
§
§**BEFORE THE
COMMISSION ON
JUDICIAL CONDUCT****MOTION FOR APPLICATION OF PROPER EVIDENTIARY STANDARD
OF RESPONDENT, THE HONORABLE SHARON KELLER****TO THE HONORABLE SPECIAL MASTER DAVID BERCHELMANN, JR.:**

The Honorable Sharon Keller ("Respondent") hereby moves the Special Master to apply the proper evidentiary standard of clear and convincing evidence to the charges brought against her by Examiner Seana Willing:

I. INTRODUCTION AND FACTS

This Motion is based on undisputed facts and the well-settled law of the United States, the State of Texas, and virtually every other state in the Union. The consensus of these authorities is unambiguous: Respondent Sharon Keller has a constitutional right to have the charges against her in this proceeding decided on the basis of a clear and convincing standard of proof, and the application of a preponderance of the evidence standard would violate her right to due process of law.

The Special Master is familiar with the facts underlying this proceeding, so Respondent will recite the facts material to this Motion very briefly. Judge Keller is now and was on September 25, 2007, the Presiding Judge of the Texas Court of Criminal Appeals ("CCA"). She was elected to the CCA in 1994 and, in 2000 was elected

Presiding Judge and was reelected to that position in 2006. Her term expires in 2012 and she is currently serving on the CCA.

On February 19, 2009, Examiner Seana Willing (the "Examiner"), on behalf of the State Commission on Judicial Conduct ("Commission"), filed a Notice of Formal Proceedings (the "February 19 Notice") against Respondent, alleging that by correctly answering a question posed by the General Counsel of the Texas Court of Criminal Appeals, Respondent committed five chargeable offenses under the Texas Constitution and the Canons of the Texas Code of Judicial Conduct. The February 19 Notice was filed following the submission of a verified statement alleging misconduct by Respondent, and a full investigation of the facts alleged in that statement by the Commission.

Respondent filed her Verified Answer on March 24, 2009.¹ The Texas Supreme Court appointed the Honorable David Berchermann, Jr., judge of the 37th Judicial District Court of Bexar County, Texas, to serve as Special Master in this proceeding pursuant to the Texas Constitution and Rule 10(c)(2) of the Procedural Rules for Removal or Retirement of Judges. This matter is set for hearing on August 17, 2009.

Under the Commission's rules, following the August 17 hearing, Special Master Berchermann is to "promptly prepare and transmit to the Commission a report which shall contain a brief statement of the proceedings had and his findings of fact *based on a preponderance of the evidence* with respect to the issues presented by the notice of formal proceedings and the answer thereto[.]" P. R. for Removal or Retirement of Judges, R. 10(h)(1) (emphasis added).

¹ The Verified Answer (at ¶ 15) included a request that the charges against Respondent be proven by clear and convincing evidence.

As is demonstrated below, employing the evidentiary standard of preponderance of the evidence in this proceeding would violate Respondent's right to due process of law under the Fourteenth Amendment to the United States Constitution and Articles 1 and 5 of the Texas Constitution. Application of the preponderance of the evidence standard would not be sufficient to ensure that any deprivation of Respondent's property interest in her position as Presiding Judge of the Court of Criminal Appeals would not be arbitrary.

Accordingly, Respondent requests that the Special Master apply the proper evidentiary standard of clear and convincing evidence to the charges brought against her.

II. ARGUMENT AND AUTHORITIES

The Fourteenth Amendment to the United States Constitution guards against deprivation of life, liberty, or property by the State without due process of law. *See* U.S. Const. amend. XIV.² In order to be entitled to the application of a clear and convincing standard of proof, Respondent must satisfy a two-step test. First, Respondent must prove that she has a property interest which is threatened by the State; second, she must show that she is entitled to a heightened evidentiary standard because the existing procedural safeguards – *i.e.*, the preponderance of the evidence standard of proof – do not ensure that interest from being arbitrarily taken from her. *See Ex parte Robinson*, 116 S.W.3d 794, 796 (Tex. Crim. App. 2003), *citing Kentucky Dep't of Corrections v. Thompson*, 490 U.S.

² Similarly, Article 1, Section 19 of the Texas Constitution states: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land." *See also Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) ("Typically, what course of law is due depends on several factors, including the private interests affected, the risk that the procedures used may erroneously deprive an interest, and the government's interest, such as the burden that the procedural requirement would entail.").

454, 460 (1989), and *Ex Parte Montgomery*, 894 S.W.2d 324, 327 (Tex. Crim. App. 1995).³

Respondent satisfies both prongs of the due process test: She has a property interest in her position as Presiding Judge of the Court of Criminal Appeals, and the application of a preponderance of the evidence standard is insufficient to ensure that she cannot be deprived of her position arbitrarily. Instead, the applicable authority dictates that the Special Master must apply a clear and convincing evidence standard in order to comply with the due process clauses of the United States and Texas constitutions.

A. Respondent Has a Property Interest in Her Position as Presiding Judge of the Texas Court of Criminal Appeals.

To have a property interest in her position as the Presiding Judge of the CCA, Respondent “must have more than an abstract need or desire for it.” She must have more than a “unilateral expectation of it.” She must, rather, “have a legitimate claim of entitlement to it.” *See Nat’l Collegiate Athletic Ass’n v. Yeo*, 171 S.W.3d 863, 870 n.19 (Tex. 2005) (quoting *Roth*, 408 U.S. at 577). In the present matter, it is clear beyond peradventure that Respondent has a legitimate claim to entitlement to her position as Presiding Judge of the CCA.

Property interests are not created by the United States Constitution. Rather, “they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . .” *Roth*, 408 U.S., at 577; *see Paul v. Davis*, 424 U.S. 693, 709 (1976). In this case, the Texas constitution provides that CCA

³ *See also Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 570-71 (1972) (noting that “due process appl[ies] only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property”); *Concerned Cmty. Involved Dev., Inc. v. City of Houston*, 209 S.W.3d 666, 671 (Tex. App.-Houston [14th Dist.] 2006, pet. denied) (“The Due Process Clause is only activated when there is some substantial liberty or property interest which is deserving of procedural protections.”).

judges are constitutional officers who attain and retain office through election or appointment by the Governor. *See* Tex. Const. art. 5, § 4(a) (CCA judges elected); *id.* art. 5, § 28(a) (vacancy on CCA filled by appointment by Governor). Furthermore, CCA judges are not at-will employees; they can be removed from office only “for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.” Tex. Const. art. 5, § 1-a(6)(A). Accordingly, Respondent possesses a property right in her continued employment as Presiding Judge of the CCA. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985).

The federal courts recognize that elected state court judges have a property interest in their positions sufficient to implicate the Due Process clause of the Fourteenth Amendment to the U.S. Constitution:

To assert entitlement to a due process claim based upon a property interest in employment, a plaintiff must establish a “legitimate claim of entitlement” to continued state employment. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). A court must look to state law to determine whether the terms and conditions of a plaintiff’s employment create a property interest in continued employment. *Id.* In Florida, judges . . . are constitutional officers who attain and retain office through election or appointment by the Governor. *See* Fla. Const. Art. V, § 10; Fla. Const. Art. V, § 11. The complaint establishes that Plaintiff had a legitimate claim of entitlement in his position as a County Judge.

Spechler v. Tobin, 591 F.Supp.2d 1350, 1358 (S.D. Fla. 2008). As already noted, just as in Florida, in Texas judges are constitutional officers who attain and retain office through

election or appointment by the Governor. Accordingly, it is beyond dispute that Respondent has a legitimate claim to entitlement to her position as Presiding Judge of the Texas Court of Criminal Appeals.

Finally, the provision of the Texas Constitution creating the Commission plainly contemplates that judges brought before the Commission will be treated as having a legitimate property interest in their positions. The relevant provision of the Texas Constitution reads as follows:

The Supreme Court shall by rule provide for the procedure before the Commission, Masters, review tribunal, and the Supreme Court. Such rule shall . . . afford to any person holding an office or position specified in Subsection (6) of this Section, against whom a proceeding is instituted to cause his retirement or removal, *due process of law* for the procedure before the Commission, Masters, review tribunal, and the Supreme Court *in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law*, regardless of whether or not the interest of the person holding an office or position specified in Subsection (6) of this Section in remaining in active status is considered to be a right or a privilege. Due process shall include the right to notice, counsel, hearing, confrontation of his accusers, *and all such other incidents of due process as are ordinarily available in proceedings whether or not misfeasance is charged*, upon proof of which a penalty may be imposed.

Tex. Const. article 5, § 1-a(11) (emphasis added). The Constitution's provision that a judge shall have "due process of law . . . in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding" clearly indicates that Respondent has a property interest in her position on the Court of Criminal Appeals, or at the very least must be treated as if she has such an interest.

B. Due Process Requires the Application of the Clear and Convincing Evidence Standard of Proof.

In addition to having a property interest in her CCA position, the applicable law demonstrates beyond peradventure that the preponderance of the evidence standard does not protect that interest from being arbitrarily taken from her. The case law, and the examples of judicial conduct commissions in other states, establish that the clear and convincing standard of proof is required to protect Respondent's due process rights.

The United States Supreme Court recognizes the due process implications of the standard of proof in civil cases where, as here, more than "mere loss of money" is at stake and reputations are in peril:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In re Winship, supra*.

The intermediate standard, which usually employs some combination of the words “clear,” “cogent,” “unequivocal,” and “convincing,” is less commonly used, but nonetheless “is no stranger to the civil law.” *Woodby v. INS*, 385 U.S. 276, 285, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966). . . . One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof.

Addington v. Texas, 441 U.S. 418, 423-24 (1979). Accordingly, in *Addington*, the preponderance of the evidence standard was found constitutionally defective in civil commitment proceedings. *See id.* at 432-33.

Proceedings to remove or otherwise sanction a judicial official are extraordinary – they are the sort of “quasi-criminal” proceedings in which more than “mere loss of money” is at stake and the threat to reputation looms. The ABA recognizes that disciplinary actions against judges, especially those which could result in their removal, are rare and of a unique character; its commentary on the ABA Model Rules for Judicial Disciplinary Enforcement states: “Judicial . . . disciplinary cases are neither civil nor criminal in nature but are sui generis.” As the court said in *In re Cieminski*:

Disciplinary proceedings [against judges] are neither civil nor criminal. Their aim is to maintain the honor and dignity of the judiciary and the proper administration of justice. The very nature and function of the judiciary can make it the target of dissidents. Case law has established that the proper standard of proof is by “clear and convincing evidence.”

In re Cieminski, 270 N.W.2d 321, 326 (N.D. 1978), citing *In the Matter of Heuermann*, 240 N.W.2d 603 (S.D.1976); *In re Inquiry Relating to Rome*, 218 Kan. 198, 542 P.2d 676 (1975); *In re Hanson*, 532 P.2d 303, 308 (Alaska 1975); *Geiler v. Commission on Judicial Qualifications*, 10 Cal.3d 270, 110 Cal. Rptr. 201, 515 P.2d 1 (1973); *In re*

Haggerty, 257 La. 1, 241 So.2d 469, 479 (1970); and *In re Diener*, 268 Md. 659, 304 A.2d 587 (1973). See also *McMillen v. Diehl*, 128 Ohio St. 212, 214, 190 N.E. 567 (1934) ("Statutes authorizing the removal of an incumbent from office are quasi penal in character, and . . . removal statutes should be strictly construed and . . . the evidence sustaining the removal of an official from office should be clear and convincing."). Accordingly, the ABA Model Rules state: "Charges of [judicial] misconduct . . . shall be established by clear and convincing evidence." ABA Model Rules for Judicial Disciplinary Enforcement, R. 7.⁴

The ABA explains its adoption of the clear and convincing standard as follows:

"Clear and convincing evidence" is a standard of proof higher than the civil law standard of "preponderance of the evidence" and lower than the criminal law standard of "beyond a reasonable doubt." *The standard of proof required to sanction a respondent's conduct is thus commensurate with the importance of protecting the judicial system's ability to function - more than required to prove a private wrong, less than required to prove a criminal offense.*

Id. Commentary (emphasis added).

The federal courts have not had to determine the standard of proof a respondent is due in a proceeding where a judge faces the possibility of removal, because under the Constitution federal judges can be removed from office only by impeachment.⁵ That said, the case law instructs, and does so clearly, that a heightened standard of proof is required in this proceeding. In *Shepherd v. ABC*, 62 F.3d 1469 (D.C. Cir. 1995), the

⁴ The ABA's Model Rules, with commentary, are at <http://www.abanet.org/cpr/juddis/rule7.html>.

⁵ Federal judges may be censured (but not removed) by a judicial council in a proceeding roughly analogous to the present action. See 28 U.S.C. §§ 351-64. That statute is silent on the standard of proof. In the only case discussing the evidentiary standard, the court did not rule on the appropriate standard, but found that the evidence was more than sufficient to support the judicial council's findings and that it satisfied the clear and convincing standard. See *McBryde v. Committee to Review Circuit Council Conduct*, 83 F. Supp. 2d 135, 149 n.11 (D.C.C. 1999), *aff'd in part, vacated in part*, 264 F.3d 52 (D.D.C. 2001).

court ruled that litigation misconduct must be proven by clear and convincing evidence in order for the district court to enter a default judgment as a sanction for the misconduct. In reaching its conclusion, the court cited a series of cases holding that proof of litigation misconduct must be clear and convincing before such conduct can be sanctioned:

We . . . have held that even civil contempt – a punishment that is part of a court’s inherent power, *see* [*Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)], and that is, if anything, more remedial than punitive – requires the petitioner to bear “a heavy burden of proof, often described as proof by clear and convincing evidence,” that the respondent violated the court’s prior order.” *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co.*, 626 F.2d 1029, 1031 (D.C.Cir.1980) (citation omitted); *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C.Cir.1993). The Supreme Court has recognized that awards of attorneys’ fees for bad faith conduct serve the same punitive and compensatory purposes as fines imposed for civil contempt. *See Chambers*, 501 U.S. at 53-54, 111 S.Ct. at 2137. As a result, courts require clear and convincing evidence of misconduct before imposing attorneys’ fees under their inherent power. *See, e.g., Autorama Corp. v. Stewart*, 802 F.2d 1284, 1287-88 (10th Cir. 1986); *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir.1982), *cert. denied*, 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983). Because the inherent power sanctions of dismissal and default serve the same purposes as contempt, “vindicat[ing] the District Court’s authority over a recalcitrant litigant,” *Chambers*, 501 U.S. at 53, 111 S.Ct. at 2137 (internal quotation and citation omitted), these sanctions should demand the same standard of proof: clear and convincing evidence.

Id. at 1476-77. *See Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir.1989) (ruling that for a district court to use its inherent power to dismiss a case based on a fraud on the court, the fraud must be proven “clearly and convincingly”); *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir.1976) (reversing a district court’s grant of summary judgment as a sanction for withholding a document in discovery, and holding that fraud upon the court “must be supported by clear, unequivocal and convincing evidence”), *cert. denied*, 429 U.S. 1040 (1977).

Obviously, a proceeding seeking the sanction of a judge elected by the citizens of the State of Texas should operate under no less a standard of proof than a proceeding to find a “recalcitrant litigant” in contempt. Indeed, the federal courts recognize that an attorney disbarment proceeding requires “clear and convincing evidence to support the finding of one or more violations warranting this extreme sanction.” *In re Medrano*, 956 F.2d 101, 102, (5th Cir. 1992). If due process requires clear and convincing evidence before an attorney or litigant can be sanctioned, Respondent is due no less.

The federal courts also demand a heightened standard of proof in other cases where important rights are at stake. In *Addington v. Texas*, 441 U.S. 418, 424 (1979), the Supreme Court acknowledged that “[o]ne typical use of the [clear and convincing] standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.” See, e.g., *Grossman v. Comm’r of Internal Revenue*, 182 F.3d 275, 277 (4th Cir. 1999) (clear and convincing evidence required to prove intent to defraud in civil tax fraud case under the Internal Revenue Code); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (denaturalization).⁶ Again, the sanction of a sitting judge demands no less process than is due in a deportation or denaturalization case.

The federal courts are not alone in requiring a clear and convincing standard of proof in important civil cases. The Texas Constitution indicates that a heightened

⁶ Courts also require clear and convincing evidence for the proof of certain claims under the Lanham Act, such as a claim of fraudulent registration or a claim for attorneys’ fees when the infringer’s conduct was fraudulent or in bad faith. See *Resorts of Pinehurst, Inc. v. Pinehurst Nat’l Corp.*, 148 F.3d 417, 420 (4th Cir. 1998) (fraudulent registration); *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 555 (5th Cir. 1998) (attorneys’ fees).

standard of evidence is required in proceedings which might lead to the removal of a judge:

Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is *clearly inconsistent* with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.

Tex. Const., art. 5, § 1-a(6). In addition, the Examiner has alleged in Charge I of the Notice of Formal Proceedings that Respondent is guilty that is “*clearly inconsistent*” with the proper performance of her duties as Presiding Judge; in Charge III, Respondent is again alleged to have committed “conduct that is *clearly inconsistent* with the proper performance of her duties.” (Emphases added.) It should go without saying that one cannot prove a violation of a legal standard requiring “clear” proof with a preponderance of the evidence standard. As already noted, a proceeding to remove or otherwise sanction a sitting, elected, judge is extraordinary. Other special civil proceedings deemed to be extraordinary uniformly require a heightened standard of proof – proof by clear and convincing evidence.

Texas courts also recognize that due process requires the use of a heightened standard of proof in civil cases where significant rights and interests are at stake. Thus, for example, in defamation suits involving public figures, actual malice must be proven by clear and convincing evidence, “which means evidence that supports a firm conviction that the fact to be proved is true.” *Bentley v. Bunton*, 94 S.W.3d 561, 596-97 (Tex. 2002); see *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 285 (1964). Similarly,

exemplary damages are authorized in Texas only when the claimant proves by clear and convincing evidence that the harm results from fraud, malice, or gross negligence. *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a); *Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 372-73 (Tex. 2004).

Because of the special status of parental rights, the quantum of proof in a proceeding where the possible termination of parental rights is at issue is elevated from the preponderance of the evidence to clear and convincing evidence. *See In Re G. M.*, 596 S.W.2d 846, 847 (Tex.1980); *see also Santosky v. Kramer*, 455 U.S. 745, 758, 769 (1982). Likewise, a party who seeks to assert the separate character of property, and deny that it is community property, must prove its separate character by clear and convincing evidence. *See* Tex. Fam. Code § 3.003(b). The same standard of review applies to both a civil commitment order and an order to administer psychoactive medication: the trial court must find by clear and convincing evidence the statutory criteria for both orders. *See* Tex. Health & Safety Code §§ 574.034(a), 574.106(a-1).

It is self-evident that the possible removal from office, or other sanction, of an elected officer of the highest criminal court of this State is as significant a proceeding as a claim for exemplary damages or an assertion that a piece of property is separate, rather than community, in nature. As already noted, due process requires that a charge of defamation against Respondent be proved by clear and convincing evidence; here, Respondent is publicly accused of unethical conduct, and deserves the same standard of proof, as the imposition of even the mildest sanction would tarnish Respondent's reputation. The interests at stake in this case are far "more substantial than mere loss of money" and the Special Master should therefore "reduce the risk to the [Respondent] of

having [her] reputation tarnished erroneously by increasing the [Special Master's] burden of proof." *Addington v. Texas*, 441 U.S. at 423-24.

If the federal and Texas authorities discussed above are not sufficient to establish that Respondent deserves to be tried under a clear and convincing evidence standard of proof, Respondent urges the Special Master to consider the law of the other 49 states. Every other State in the Union which provides for removal of an elected justice of its highest court by some mechanism other than (and typically in addition to) legislative impeachment employs a clear and convincing standard of proof.⁷ The overwhelming

⁷ See *Moore v. Judicial Inquiry Comm'n of State of Ala.*, 891 So.2d 848, 862 (Ala.) ("The applicable standard of review . . . is that the evidence must be clear and convincing."), *cert. denied*, 543 U. S. 875 (2004); 2008-09 Alaska Jud. Conduct Comm'n R., R. 14(f) ("The standard of proof is clear and convincing evidence."); Ariz. R. Comm'n Jud. Conduct, R. 27(f)(1) ("Findings of fact shall be based on clear and convincing evidence as that term has been defined by the supreme court."); R. P. Ark. Jud. Disc. & Disability Comm'n, R. 11(D) ("Facts justifying action shall be established by clear and convincing evidence."); *Geiler v. Commission on Judicial Qualifications*, 515 P. 1, 10 Cal 3d 270, 275 (Cal. 1973) (ruling that the standard of proof in Judicial Commission proceedings is "proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty"); Colo. R. Jud. Disc., R. 31; *In re Jones*, 728 P.2d 311, 313 (Colo. 1986) ("The standard of proof in formal proceedings before the commission is clear and convincing evidence."); Conn. Regs., Section 51-51k-8(k) ("The [Judicial Review] Council has the burden of finding by clear and convincing evidence the facts justifying the action taken by the Council."); Del. Ct. Jud. R., R. 13(g) ("Charges of misconduct, or charges of disability under Rule 16, shall be established by clear and convincing evidence."); *In re Dekle*, 308 So.2d 5, 12 (Fla. 1975) ("the Commission must find from clear and convincing evidence that the justice or judge has been guilty of" a removable offense); Ga. R. Jud. Qualifications Comm'n, R. 7(e) ("The Rules of Evidence applicable to civil cases shall apply at all hearings before the Commission or the Special Master, and the standard of proof shall be clear and convincing evidence."); Hawai'i R. Sup. Ct., R. 8.9 ("All findings of the Commission shall be supported by clear and convincing evidence."); *Idaho Judicial Council v. Becker*, 122 Idaho 288, 834 P.2d 290, 293 (1992) ("In assessing the evidence presented in this proceeding, we apply a clear and convincing burden of proof standard."); R. P. Ill. Courts Comm'n, R. 9(b) ("The allegations of the complaint must be proved by clear and convincing evidence."); Ind. Admission & Disc. R., Rule 25 (K)(6) ("The Commission shall have the burden to prove misconduct on the part of the judicial officer by clear and convincing evidence."); *In re Inquiry Concerning McCormick*, 639 N.W.2d 12, 15 (Iowa 2002) (ethical violations by judges must be proven by a convincing preponderance of the evidence); *In re Long*, 244 Kan. 719, 721-22, 772 P.2d 814 (1989) (both commission and reviewing court apply clear and convincing standard); Ky. Sup. Ct. R., R. 4.160; *Starnes v. Judicial Retirement & Removal Comm'n.*, 680 SW2d 922, 923 (Ky. 1984) ("The evidence to sustain the charges met the necessary standard; it was "clear and convincing."); La. Const. Art. 5, § 25(C) (the charges against a judge must be proved by clear and convincing evidence before Supreme Court can impose discipline); Md. R., tit. 16, R. 16-808(j) ("If the Commission finds by clear and convincing evidence that the judge has a disability or has committed sanctionable conduct, it shall either issue a public reprimand for the sanctionable conduct or refer the matter to the Court of Appeals pursuant to section (k) of this Rule."); Mass. G.L.c. 211C, § 7(4) ("The commission shall have the burden of proving the charges by clear and convincing evidence."); Minn. Rules

endorsement of the heightened standard of clear and convincing evidence reflects an

of Board on Judicial Standards, R. 10(c)(2) ("The board has the burden of proving by clear and convincing evidence the facts justifying action."); *In re Miera*, 426 N.W.2d 850, 853 (Minn. 1988) (standard of proof in judicial and attorney disciplinary proceedings requires full, clear and convincing evidence); *Mississippi Comm'n on Jud. Perf. v. Justice Ct. Judge T.T.*, 922 So.2d 781 (Miss. 2006) ("This Court conducts a de novo review of judicial misconduct proceedings, giving great deference to the findings, based on clear and convincing evidence, of the Mississippi Judicial Performance Commission."); R. Mont. Jud. Standards Comm'n, R. 13(e) ("The complainant, acting through the prosecuting attorney, shall have the burden of proof that the charges are true by clear and convincing evidence[.]"); *In re Complaint Against Lindner*, 271 Neb. 323, 327-28, 710 N.W.2d 866 (Neb. 2006) (special master and commission must make findings based on clear and convincing standard); P. R. Nev. Comm'n Jud. Disc., R. 25 ("Counsel appointed by the commission to present the evidence against the respondent have the burden of proving, by clear and convincing legal evidence, the facts justifying discipline in conformity with the averments of the formal statement of charges."); R. Sup. Ct. N.H., R. 40 (P. R. Committee Jud. Conduct), R. 11(d) ("Hearing counsel shall have the burden of establishing by clear and convincing evidence a violation of the Code of Judicial Conduct."); N.J. R. Gov'g App. Prac. Sup. Ct. & App. Div., R. 2:15-15(a) ("If the Committee determines after a formal hearing that the charges against the judge have been proved by clear and convincing evidence and that a recommendation should be made to the Supreme Court for public reprimand, censure, suspension, or removal, it shall promptly file with the Clerk of the Supreme Court a Presentment setting forth its findings and its recommendation."); *In re Subryan*, 187 N.J. 139, 144, 900 A.2d 809 (2006) ("When the ACJC recommends that a judge be disciplined by the Supreme Court, the Committee has determined that the charges against the judge were proven by clear and convincing evidence."); *In the Matter of Rodella*, 190 P.3d 338, 343 (N.M. 2008) ("When we are called upon to discipline a judge, we undertake an independent evaluation of the record to determine whether clear and convincing evidence supports the Commission's recommendation[.]"); *In re Inquiry Concerning Badgett*, 362 N.C. 482, 487, 666 S.E.2d 743, 746-47 (N.C. 2008) (supreme court may adopt the commission's findings of fact only if they are supported by clear and convincing evidence); N.D. R. Jud. Conduct Comm'n, R. 9 ("Charges of misconduct and grounds for transfer to and from incapacity inactive status must be established by clear and convincing evidence."); *In re Cieminski*, 270 N.W.2d 321, 326 (N.D. 1978) ("Case law has established that the proper standard of proof is by 'clear and convincing evidence.'"); *McMillen v. Diehl*, 128 Ohio St. 212, 214, 190 N.E. 567 (1934) (evidence should be clear and convincing to sustain removal of official such as judge from office); *Lavender v. Woodliff*, 605 P.2d 1338, 1338 (Okla. Jud. 1979) (clear and convincing evidence established that district judge was physically disabled and that disability would prevent proper performance of his duties as district judge; citing O.S. 1971 Const. art. 7-A, § 4(d)); Or. Comm'n Jud. Fitness & Disability, R. P., R. 16(a) ("If, after consideration of the evidence presented at a public hearing or the report of the masters, the Commission finds good cause by clear and convincing evidence, it shall recommend to the Supreme Court the discipline of the judge."); *In re Field*, 281 Or 623, 576 P.2d 348 (1978); Pa. Const. Art. V, § 18(b)(5) ("the board shall have the burden of proving the charges by clear and convincing evidence."); *In re Berkheimer*, 593 Pa. 366, 370, 930 A.2d 1255 (2007) ("The Court of Judicial Discipline determined the Judicial Conduct Board, by clear and convincing evidence, proved the allegations occurred, that they were highly offensive, and that appellant exhibited inappropriate conduct."); S.C. App. Ct. R., R. Jud. Disc. Enforcement, R. 8 ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel."); *Matter of Heuermann*, 240 N.W.2d 603, 606 (S.D. 1976) (standard of proof for imposing censure on judges is by "clear and convincing evidence"); Tenn. Code Ann. § 17-5-308(d) ("Charges of misconduct shall be established [before the Court of the Judiciary] by clear and convincing evidence."); *Judicial Inquiry & Review Comm'n of Va v. Peatross*, 269 Va. 428, 611 S.E.2d 392 (2005) ("The Judicial Inquiry and Review Commission has the burden to prove by clear and convincing evidence the judicial disciplinary charges brought to the Supreme Court."); Wash. Code Jud. Conduct R. P., R. 7 ("Findings of violations of the Code of Judicial Conduct or incapacity shall be based upon clear, cogent and convincing evidence"); Wisc. Stat. 757.89 ("The allegations of the complaint or petition must be proven to a reasonable certainty by evidence that is clear, satisfactory and convincing."); Wy. Comm'n R. 12(c) (requires proof by clear and convincing evidence).

attention to due process absent from the Commission's rules. Of the states that do not provide for removal on the basis of clear and convincing evidence, four of them (Maine, Rhode island, Vermont, and West Virginia) allow the removal of justices only by impeachment,⁸ and the few states that do allow for the removal of justices based on a preponderance of the evidence standard (Missouri, New York, and Utah) do not elect those justices, so those judges have less of a property interest in their positions.⁹

In sum, the overwhelming weight of relevant authority in every conceivable jurisdiction instructs that due process demands that the charges brought against Respondent in this proceeding be determined according to a clear and convincing burden of proof.

III. CONCLUSION AND PRAYER.

The issue here really is this simple: The Due Process Clause of the Fourteenth Amendment of the United States Constitution, and Article 1, § 19, and Article 5, § 1-a (11) of the Texas Constitution, trump Rule 10(h)(1) of the Procedural Rules for the Removal or Retirement of Judges. Respondent is entitled, under the United States and

⁸ See Me. Const. Art. VI, § 4 (providing that judges may only be "removed by impeachment or by address of both branches of the Legislature to the executive"); R.I. General Laws, Tit. 8, ch.16, § 7(b) (if Commission on Judicial Tenure and Discipline recommends removal of supreme court justice, removal must be by impeachment in legislature); Vt. Const. § 58 (removal of judicial officials through impeachment); W.Va. Const. Art. VIII, § 8 (judges can be removed from office only by impeachment). Michigan has no mechanism to deal with misbehavior by Supreme Court Justices.

⁹ See *In re Hill*, 8 S.W.3d 578, 581 (Mo. 2000) (charges in a judicial disciplinary proceeding must be proved by a preponderance of the evidence); Mo. Const. Art V, § 12(a) (candidates for judicial offices are selected by commission and the governor selects and appoints from among the candidates); *Matter of Mogil*, 650 N.Y.S.2d 611, 612 (N.Y. 1996) (judicial misconduct need only be established by preponderance of evidence); N.Y. Const. Art. VI, § 2 (judges of the court of appeals – New York's court of last resort – are chosen by merit selection in a system similar to Missouri's); Utah Judicial Conduct Comm'n, Admin. Code, R595-3-1 ("Formal charges shall be established by a preponderance of the evidence;"); Utah Const. Art. VIII, § 8 (a commission submits three judicial nominees to the governor, who selects among them; each appointee must be confirmed by the senate).

Texas constitutions, to due process of law. As shown above, due process requires the application of a clear and convincing standard of proof in this proceeding.

WHEREFORE, for the reasons set forth above, Respondent respectfully requests that the Special Master make any findings of fact in this matter based upon the clear and convincing evidence properly admitted before him.

Respectfully submitted,
JACKSON WALKER L.L.P.

By: 

Charles L. Babcock
State Bar No. 01479500
Email: cbabcock@jw.com
Mary Lou Flynn-DuPart
Texas Bar No. 07199700
1401 McKinney, Suite 1900
Houston, Texas 77010
(713) 752-4200
(713) 752-4221 – Fax
Kurt Schwarz
State Bar No. 17871550
Email: kschwarz@jw.com
Shannon Zmud
State Bar No. 24047169
901 Main St., Ste. 6000
Dallas, Texas 75202
(214) 953-6000
(214) 953-5822 – Fax

**ATTORNEYS FOR RESPONDENT
THE HONORABLE SHARON
KELLER**

CERTIFICATE OF SERVICE

This is to certify that on this 31st day of July, 2009, a true and correct copy of the foregoing document was served via electronic transmission:

Ms. Seana Willing
State Commission on Judicial Conduct
P.O. Box 12265
Austin, Texas 78711
Facsimile #512-463-0511

Mr. John J. McKetta, III
Graves Dougherty Hearon & Moody
401 Congress Ave., Suite 2200
Austin, Texas 78701

A handwritten signature in black ink, appearing to read "John J. McKetta, III", written over a horizontal line.